

**COMMISSION FOR MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND
SUBSTANCE ABUSE SERVICES**

Rules Committee Minutes

**Clarion Hotel State Capital
320 Hillsborough Street
Raleigh, NC 27603**

Thursday, January 26, 2012

Attending:

Rules Committee Members:

Jennifer Brobst, Dr. Richard Brunstetter, Matthew Harbin, Pamela Poteat, Don Trobaugh, Anna R. Cunningham, Dr. James Finch, David Turpin

Excused Absence: Debra Dihoff

Other Commission Members In Attendance:

Kevin P. Oliver, Frank Edwards, Marion S. Spencer, James Bowman, Dr. Greg Olley

Division Staff: Steven E. Hairston, W. Denise Baker, Amanda J. Reeder, Marta T. Hester, Andrea Borden, Lynn B. Jones, Jason Reynolds, Donna Brown, Bill Scott

Others:

Louise G. Fisher, Henry Tarkington

Call to Order:

Jennifer Brobst, Chair, called the meeting to order at 1:19 p.m. All members of the Rules Committee, staff and public were introduced. Ms. Brobst read the Ethics Reminder and asked if any members had a conflict or appearance of conflict with respect to any matters coming before the Rules Committee. There were none. Ms. Brobst reminded the members of the attendance and training requirements of Executive Order 34.

Old Business:

Ms. Brobst reminded the Committee members that the Commission was seeking an update on the status of the proposed amendments to Rules 10A NCAC Section 26D, North Carolina Department of Corrections: Standards for Mental Health and Mental Retardation rules. Ms. Brobst reminded the members that the Department of Correction had been reorganized and merged with other agencies as the Department of Public Safety (DPS). Ms. Brobst stated that she was in the process of drafting a letter to the DPS requesting that the rules be moved forward. Ms. Brobst stated that she would send a draft of the letter to the members via email for review.

Ms. Brobst reminded the Committee members that at the previous meeting, it worked on identifying other bodies that had work similar to the Commission's. Ms. Brobst encouraged the members to monitor those groups online.

Ms. Brobst stated that the Rules Review Commission ("RRC") will be meeting on February 16, 2012; no Commission rules are on the agenda. Ms. Brobst stated she will attend RRC meetings and encouraged the members to attend a meeting to learn more about the work of the RRC. She

encouraged members to join the listserv for the NC Register, which is the publication that announces newly proposed rule actions.

Ms. Brobst thanked staff for preparing the materials for the meeting. She gave a summary of the October 27, 2011 meeting, stating that it is important for the Committee members to think strategically, tracking changes in state and federal law. Ms. Brobst stated if there were no new rules mandated by law, the Rules Committee could review existing rules to determine which ones should be updated. Ms. Brobst suggested looking at rules which were adopted before 1990. Ms. Brobst stated that she attended the Advisory Committee meeting in the morning, and believed that Committee could be a funnel for new rule ideas.

Frank Edwards, Commission member, stated that many of the Commission's rules affect certain populations. Mr. Edwards stated that when reviewing those rules, it would be a good idea to have individuals in those groups advise the Committee on how they are affected.

Anna Cunningham, Committee member, recommended a cursory review of rules that impacted Local Management Entities ("LMEs") and Managed Care Organizations ("MCOs"). Ms. Brobst responded that this would be a very broad undertaking.

Dr. Richard Brunstetter, Committee member, stated that the Division of Medical Assistance ("DMA") is very important in the mental health, developmental disability, substance abuse (mh/dd/sa) system. Dr. Brunstetter recommended reviewing any rules that affected DMA and the Division of Mental Health, Developmental Disabilities and Substance Abuse Services ("DMH/DD/SAS") jointly. Steven Hairston, Chief, Operations Support Section, DMH/DD/SAS, stated that all collaboration between DMH/DD/SAS and DMA are governed by Memoranda of Agreement, not rules.

Approval of Minutes:

Upon motion, second, and unanimous vote, the Rules Committee approved the minutes of the October 27, 2011 Rules Committee Meeting.

Presentations:

Steven Hairston stated that the DMH/DD/SAS is reviewing its policies in order to determine which policies should be put in rule. Mr. Hairston stated that the review is new so no action is needed; it is just for the member's information at this time; however, the DMH/DD/SAS may come to the Commission with rule language generated from this review in the future.

Matthew Harbin, Committee member, asked how the Division determines its authority to make policy. Mr. Hairston stated that, pursuant to General Statute 122C, the Secretary of the Department of Health and Human Services ("DHHS") has authority to run the mh/dd/sa system. Mr. Harbin asked how the Division determines which body, if any, has rulemaking authority. W. Denise Baker, Team Leader, Division Affairs Team, informed Mr. Harbin that the authority is set forth in statute; where clarity is needed, the Division typically consults with the NC Department of Justice and the counsel for the RRC to ensure rulemaking authority exists before bringing proposed rule language before the Commission members.

Proposed Adoption of Rules 10A NCAC 27A .0500, Uniform Co-Payment Graduated Fee Schedule

Bill Scott, Section Chief, Resource and Regulatory Management, DMH/DD/SAS, presented the proposed adoption of these rules. Mr. Scott informed the Committee members that, in 2007, the General Assembly passed law to require the Secretary of DHHS to promulgate rule language

setting forth a co-payment schedule for individuals receiving state funded services. Mr. Scott added that the legislation stated that the schedule would only apply to families whose family income is three hundred percent (300%) or greater of the federal poverty level. In 2011, the General Assembly passed another law (Session Law 2011-145) directing the Secretary to ensure that the rules tracked Medicaid co-payment rules. Mr. Scott stated that the Division's proposed co-payment schedule was intended to track the Medicaid co-payment rule set forth in 10A NCAC 22D .0101, "Co-Payment. Mr. Scott stated that as these rules were being promulgated pursuant to Secretary authority, the rules were being presented for review and comments of the Committee members. No action was required.

Mr. Scott received the following inquiry:

- Dr. Brunstetter asked what the current federal standard for 300% of poverty was. Mr. Scott stated he did not know, but would be happy to provide that information to the Committee at a later date.

Proposed Amendment of Rules 10A NCAC 26F .0105 and .0106, Schedules IV and V

Amanda J. Reeder, Rulemaking Coordinator, Division Affairs Team, DMH/DD/SAS, presented this rule in lieu of Bill Bronson, Drug Control Unit Manager, Community Policy Management, DMH/DD/SAS. Ms. Reeder informed the Committee that the Division proposed updating the rules to stay current with the federal drug schedules. Specifically, the federal government issued a rule adding Carisoprodol as a depressant in Schedule IV, effective January 11, 2012. The federal government also scheduled Ezogabine, in any material, compound, mixture, or preparation which contains any quantity of the substance having a depressant effect on the central nervous system, including its salts, into Schedule V, effective December 15, 2011.

Ms. Reeder informed the Committee that, pursuant to G.S. § 90-88(d) "Authority to Control", the Commission was required to act after the federal government scheduled a substance. The Commission could either amend its rules to conform to the federal scheduling and follow a truncated rulemaking procedure, pursuant to G.S. § 90-88(d), where publication in the NC Register and public hearing are not required, or reject the scheduling and initiate regular rulemaking to object to the federal action.

Ms. Reeder received the following inquiries and comments:

- Ms. Cunningham stated that in the future, she would appreciate more information regarding the drugs affected, including generic names.
 - Ms. Reeder stated she would be happy to send the members information to allow them to access the Federal Registers which detail the federal drug changes.
- Dr. James Finch, Committee member, informed the Committee that it was a good idea for the federal government to schedule these drugs, and the Commission should follow suit.
- David R. Turpin, Committee member, agreed with Dr. Finch.

Upon motion, second, and unanimous vote, the Rules Committee approved the recommendation of the proposed amendments of 10A NCAC 26F .0105 & .0106 to the full Commission.

Proposed Repeal of 10A NCAC 29D .0801, Notification Procedures for Provision of Services

Ms. Reeder presented the proposed repeal to the Commission. She informed the Committee members that, pursuant to Executive Order 70, the Division had reviewed its rules to determine which rules were outdated or unnecessary and as such, needed amendment or repeal. Ms. Reeder stated that 10A NCAC 29D .0801 was adopted in 1993. In 1996, the Division adopted Rule 10A NCAC 27G .0505, "Notification Procedures for Provision of Services", which repeats the contents of 10A NCAC 29D .0801 verbatim. Ms. Reeder informed the Committee members that there is no need to have two rules repeating the same information in the NC Code as it may create confusion. Ms. Reeder added that as many rules in Chapter 29 have been repealed, it seemed prudent to repeal this rule, rather than Rule 10A NCAC 27G .0505.

Ms. Reeder stated that as the rule was promulgated under the Secretary's rulemaking authority, the rule was being presented to the Committee for review and comments. No action is required.

Review of Fiscal Notes: Overview

In response to a request from Ms. Brobst, Ms. Baker informed the Committee members that the Administrative Procedures Act (G.S. § 150B) was changed by the legislature in the 2011 session. Some of the changes affected the preparation and approval mechanism for fiscal notes. Ms. Baker reminded the Committee members that in the past, the Division prepared a fiscal note for all rules written pursuant to the authority of the Commission or the Secretary and submitted that note to the DHHS and the Office of State Budget Management ("OSBM") for review and approval. Following that approval, the Division submitted the rules for publication in the NC Register. The law has been amended to require that rulemaking bodies review all fiscal notes prepared for their respective rules and approve the same before the rules can be published. Ms. Baker added that substantial economic impact has been redefined as creating costs or savings of \$500,000 or more annually. If a rule or set of rules, is determined to create substantial economic impact, the rulemaking body itself must now consider at least two alternatives to the rules.

Review of Proposed Fiscal Note for Proposed Amendments to Rules 10A NCAC 27G, Section .3800 - Substance Abuse Services for DWI Offenders

Lynn B. Jones, Community Policy Management Section, DMH/DD/SAS, gave a brief overview of the services governed by the rules. These rules govern the program administered to individuals who are arrested and convicted of Driving While Impaired. Ms. Jones stated that annually, there are 73,000 arrests for DWI, resulting in 45,000 convictions. Ms. Jones stated that most of the individuals subject to the rules (75%) receive outpatient treatment services, 20% receive ADETS, and 5% receive more extensive treatment, such as residential or inpatient services.

Ms. Jones stated that the Division's role in this process is to authorize the providers to offer the services and monitor the facilities to verify that every individual receives the appropriate level of services. In addition, the Division trains providers and promotes best practices. Ms. Jones stated that the Division initiated this rule change and asked the Commission to update the rules because they have not been revised since 2001. Ms. Jones reminded the Committee members that the Commission reviewed and proposed amendments to all 17 DWI rules; however, today the Committee would only be reviewing six, as those six are expected to create fiscal impact.

Ms. Brobst inquired about the status of the other 11 rules, asking if they were currently being considered by the RRC. Ms. Reeder replied in the negative, and reminded the Committee members that as part of the amendments, the Commission reorganized the rules by placing rule language in other rules. Therefore, the rules will need to move forward as one package.

Ms. Jones reviewed the following rules with the Committee members:

Rule 10A NCAC 27G .3804 - ADETS Instructors

The Division anticipates that the proposed amendment, which will provide free training for certain licensed individuals, will create \$45,000 in savings to the private sector.

- Dr. Brunstetter inquired who created the fiscal review.
 - Ms. Jones stated that the Division's budget office completed the analysis, based upon information provided by the content expert for the rule. In this case, the content experts were herself and her colleague, Jason Reynolds.
- Mr. Harbin inquired about the changes and their impact.
 - Ms. Jones stated that under the proposed rules, providers of ADETS will be required to have fewer hours of training, which will be provided through the vendor of the curriculum.

Rule 10A NCAC 27G .3806 - Authorization: Facilities Providing Substance Abuse Services to DWI Offenders

The Division anticipates this rule will create a savings for the state, as the provider agencies will now be monitored by Division staff every three years, rather than at two year intervals. Ms. Jones stressed that this will only apply to providers in good standing; if a provider has problems, then the Division will be monitoring the provider more than once every three years. In addition, the Division will no longer handle appeals following decertification or suspensions of providers, and those will instead go directly to the Office of Administrative Hearings.

- Ms. Brobst asked why the appeals would not longer be heard by the Division.
 - Ms. Jones stated that as the Division was the agency taking the action to decertify or suspend the provider, it did not seem appropriate for it to review its own decision. Ms. Jones stated that in the years she has been with the Division, no provider has ever been decertified or suspended, as the Division typically works with its providers to ensure the providers are complying with law and rules.

Rule 10A NCAC 27G .3807 - DWI Substance Abuse Assessment Elements

The Division anticipates this rule will result in the expenditure of \$1,260,000 in private funds annually and \$6,000 in state funds. This cost is being incurred as a result of adding a requirement that drug testing be performed at every assessment. Division staff reminded the Committee that assessments are conducted pursuant to G.S. § 122C-142.1, which caps the fee for assessments at \$100.00. This means any additional costs to providers cannot be passed to the consumers without a statute change. The Division anticipated that drug tests will cost between \$25 and \$75. In addition, the Division anticipates that the state will incur a cost to train the provider agencies to provide proper screenings, resulting in a cost of \$6,000. Division staff consulted with provider agencies in computing these costs.

The Rules Committee considered the following alternatives to the rule:

1. Amending the rule language to state that the screening will be done by amino assay testing, which is much cheaper. However, the Committee did not accept this alternative, as it would hem in providers who wished to use the more comprehensive testing.

2. Eliminating the drug testing requirement from the rule. The Committee did not accept this alternative, as it believed that the screening is critical to ensure that all assessed individuals are given appropriate treatment.
3. Amending the rule language to state that the initial drug screening would be amino assay. If the test came back positive for any agents in addition to alcohol, then a more detailed laboratory work would be done. The Committee did not accept this alternative. The Committee acknowledged that this may not reduce costs to under \$500,000.00 annually. Also, the Committee did not wish to hem in providers who wished to use the more comprehensive testing at the outset.

Rule 10A NCAC 27G .3809 - Responsibilities of Treatment and ADETS Providers

The Division anticipates the proposed amendment to this rule, capping the number of individuals who can attend general and intermediate outpatient programs to 12 participants, will create expenditures of \$4,232,250 in the private sector. Ms. Jones stated that pursuant to Rule 10A NCAC 27G Section .3500, "Outpatient Facilities for Individuals with Substance Abuse Individuals", specifically Rule 10A NCAC 27G .3503(a), outpatient groups should be limited to 20 individuals. Ms. Jones stated that about 12% of the providers (which handle 38% of the treatment completions) currently have groups comprised of 13 or more participants. Ms. Jones informed the Committee that by capping the group size at 12, this will require providers to hire more staff to accommodate the additional groups created by the smaller size.

The Rules Committee considered the following alternatives to the rule:

1. Amend the proposed rule language to eliminate the group size cap of 12. The Committee did not accept this alternative, as a smaller group size is necessary to provide adequate and appropriate treatment to the consumers.
2. Amend the proposed rule language to set the cap at 18 people per group. The Committee did not accept this alternative, as having a limit of 12 individuals in the group will ensure better treatment and give individuals an opportunity to have one-on-one counseling.

Rule 10A NCAC 27G .3812 - Placement Criteria for Assessed DWI Clients

The Division anticipates that the changes proposed to the various treatment levels, specifically as it relates to the number of hours required to complete treatment, will create costs of between \$4,179,168 and \$4,663,008 to the private sector.

The Rules Committee proposed to recommend that the Commission revisit the language of the proposed amendment to reduce the hourly requirements thusly:

(1) General Outpatient Treatment: The language as proposed for amendment states, "Each client must have service scheduled weekly for a minimum of 12 weeks for a minimum of 32 hours." Amend lines 41 and 42 of the Rule to state the original language in the rule, "Each client must have services scheduled for a minimum of 20 hours over a minimum 30 day period." As the rule language for this level of treatment will not change, it should not create any fiscal impact.

(2) Intermediate Outpatient Treatment: The language as proposed for amendment states, "Each client must have services scheduled weekly for a minimum of 12 weeks for a minimum of 48 hours." Amend line 54 of the Rule to state that the minimum hourly requirement is 40 hours. As the amended rule language for the hourly requirement will not change, it should reduce the fiscal impact.

(3) Inpatient and Residential Treatment: The language as proposed for amendment states, “If less than 90 days, a minimum of 48 hours of treatment is required.” Amend line 80 of the Rule to state that the minimum hourly requirement is 40 hours. This will reduce the expenditures required by this rule change. It will not completely eliminate the expense, as there is currently no hourly requirement in the rule for these services; rather, the rule requires all treatment to occur within a minimum 90 day timeframe.

Rule 10A NCAC 27G .3814 - Minimal Program Content

The Division anticipates that the proposed rule change will result in the expenditure of \$448,000 in private costs. This is due to the rule change putting into rule the curriculum currently in use. Ms. Jones reminded the Rules Committee that the Commission has approved this curriculum. As this rule did not create substantial fiscal impact, the Committee did not propose any alternatives or move to amend the proposed rule language.

Upon motion, second, and unanimous vote, the Rules Committee approved sending its recommendations regarding the fiscal note to the full Commission.

Dr. Finch asked the staff to notify the Committee members when the rules were posted on the Commission’s web page.

Review of Fiscal Note for Proposed Amendment to Rule 10A NCAC 27G .0813 - Waivers of Licensure Rule

Ms. Reeder presented this fiscal note to the Committee members. Ms. Reeder informed the Committee that the Rule change was expected to create minimal savings of state, local and private funds. As such, the fiscal note had already been reviewed and approved by DHHS and OSBM. Ms. Reeder informed the Committee that pursuant to G.S. § 150B-19.1(e), the Division is required to review the details of the fiscal note with the Commission, as the rulemaking body, and request approval before submitting the proposed amendment for publication.

Upon motion, second, and unanimous vote, the Rules Committee approved the recommendation to approve the fiscal note as prepared to the full Commission.

Public Comment:

There was none.

There being no further business, the meeting adjourned at 5:16 p.m.